IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-1143

RAY MARSHALL, Secretary of Labor, et al.,
Appellants,

vs.

BARLOW'S, INC.,
Appellee.

On Appeal from the United States District Court for the District of Idaho

BRIEF AMICUS CURIAE FOR PACIFIC LEGAL FOUNDATION IN SUPPORT OF APPELLEE

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OPINION BELOW

The opinion of the three-judge district court is reported at 424 F. Supp. 437 (D. Id. 1976).

INTEREST OF AMICUS

Pacific Legal Foundation (hereinafter PLF) is a nonprofit, tax-exempt corporation organized and existing under the laws of California for the purpose

of engaging in litigation in matters affecting the public interest. Policy for PLF is set by a Board of Trustees composed of concerned citizens, the majority of whom are attorneys. The Board evaluates the merits of any contemplated legal action and authorizes such legal action only where the Foundation's position has broad support with the general community. The Board has authorized the filing of this brief *amicus curiae*.

All of PLF's members, contributors, and supporters, as well as all American citizens, will be vitally affected by the subject matter of this litigation.

At issue in this case is the right of American citizens to be secure from arbitrary governmental intrusion. The Fourth Amendment to the Constitution provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated and no warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Although the language of the Fourth Amendment is clear, the government claims the right to conduct warrantless inspections of businesses pursuant to Section 8(a) of the Occupational Safety and Health Act of 1970 (OSHA), 29 U.S.C. § 657(a) (1970). If the OSHA warrantless inspection provision is upheld, it will provide a dangerous precedent that threatens to swallow the Fourth Amendment in the interest of administrative expediency.

PLF, as a public interest organization, supports the goal of a safe workplace for all Americans. This goal can and must be achieved, however, without sacrificing the personal liberties guaranteed all citizens by the Fourth Amendment.

Pursuant to Supreme Court Rule 42, this brief is filed with the written consent of all parties, which consents have been filed with the Clerk of this Court.

SUMMARY OF ARGUMENT

Pursuant to Section 8(a) of OSHA, the government claims the right to "inspect" without a warrant all areas where work is performed by an employee in the United States. These "inspections" are, in reality, warrantless searches of private property. The Fourth Amendment right asserted by the appellee in this case is the historic right of all Americans to be free from governmental invasion of privacy and individual liberty.

This Court has upheld the right of the individual against warrantless government inspections based upon administrative expediency. Because the rights protected by the warrant requirement are so fundamental, this Court has held that warrantless administrative "inspections" or searches are violations of the Fourth Amendment unless they are made under certain extraordinary circumstances which are not present here. This case presents no emergency or inherently dangerous situation. However, requiring that a determination of probable cause be made by a mag-

istrate would reduce the risk that "discretionary" searches would be used for purposes of harassment. Moreover, there is no evidence that a warrant requirement would frustrate the government's objective of providing a safe workplace for all Americans. In fact, since OSHA annually inspects only 1.6 percent of the workplaces covered by the Act, a probable cause requirement would better protect employees by shifting the inspection emphasis to more serious safety violations. A warrant requirement would in no way diminish the elements of surprise and employer motivation deemed critical by OSHA.

If warrantless administrative searches are upheld upon the ground of administrative expediency, then the Fourth Amendment will be diluted to the point of becoming merely form and not substance. Inspections pursuant to state and federal statutes have become so pervasive that they threaten to swallow all Fourth Amendment protection. The OSHA inspection provision at issue is extremely broad in its sweep. Allowing this broad exception to the warrant requirement will set a precedent for further encroachments on the right to privacy.

ARGUMENT

I

THE EXTREME VIEW ASSERTED BY THE GOVERNMENT IS REPUGNANT TO THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT

This case presents another attempt by the government to "vindicate an extreme view of the Fourth

Amendment that would restrict the protection of the Warrant Clause to private dwellings and a few other 'high privacy areas.'" *U.S. v. Chadwick,* — U.S.—, 45 U.S.L.W. 4797, 4801 (1977) (Blackmun, J., dissenting).

Pursuant to Section 8(a) of OSHA, 29 U.S.C. § 657(a), the government claims the right to inspect, without a warrant, all areas "where work is performed by an employee." In arguing for "reasonable warrantless inspections" and protection of "significant privacy interests" (Brief for the Appellants (hereinafter Brief) at 15), the government is urging a return to the earlier rationale that the Fourth Amendment is inapplicable when an administrative inspector touches only on the "periphery" of protected Fourth Amendment rights. (*See, Frank v. Maryland,* 359 U.S. 360 (1959).) These assertions by the government that the power to make a warrantless search in "civil" matters was greater than the governmental authority in criminal matters "perverts the Amendment." *Able v. United States,* 362 U.S. 217, 254 (1960) (Brennan, J., dissenting). Moreover, it ignores that the warrant requirement comes not only from the Fourth Amendment, but also from the long conflict between arbitrary governmental conduct and the rights of individuals to be secure from governmental intrusions into areas not traditionally regulated.

One of the earliest challenges to warrantless administrative searches occurred in 1949. In *District of Columbia v. Little,* 178 F.2d 13, *aff'd on other*

grounds, 339 U.S. 1 (1949), the United States Court of Appeals for the District of Columbia Circuit proscribed warrantless administrative searches of private homes. A District of Columbia ordinance required dwellings to be kept clean. Health officials were empowered to inspect any dwelling believed to be in an unsanitary condition. In this case Mr. Little refused admittance to the "inspector" and was arrested and convicted in municipal court. The government argued on appeal that the Fourth Amendment applied only to searches for criminal evidence and that the protections of the Fourth Amendment could not be invoked unless there was a possibility of self-incrimination. Judge Prettyman rejected this argument and found that the protection of the Fourth Amendment applied to "civil" as well as criminal searches. The Fourth Amendment was designed to protect the common law right to privacy. This prohibition against searches:

> "was the common-law right of a man to privacy in his house, a right which is one of the indispensable ultimate essentials of our concept of civilization. It was firmly established in the common law as one of the bright features of the Anglo-Saxon contributions to human progress. It was not related to crime or to suspicion of crime. It belonged to all men, not merely to criminals, real or suspected. . . . To say that a man suspected of a crime has a right to protection against search of his home without a warrant, but that a man not suspected of a crime has no such protection, is a fantastic absurdity." *District of Columbia v. Little,* 178 F.2d at 16-17.

This "fantastic absurdity" applies equally as well to health inspectors as police:

> "This right of privacy is not conditioned upon the objective, the prerogative or the stature of the intruding officer. His uniform, badge, rank, and the bureau from which he operates are immaterial. It is immaterial whether he is motivated by the highest public purpose or by the lowest personal spite." *Id.* at 17.

Although the rationale of *Little* was briefly eclipsed, the dissenters in *Frank,* applying a historical analysis, argued that the First, Fourth, and Fifth Amendments were the result of a bitter lesson of the American Revolution and that the purpose of the Fourth Amendment was to proscribe all unreasonable intrusions into the privacy of American citizens:

> "These three amendments are indeed closely related, safeguarding not only privacy and protection against self-incrimination but 'conscience and human dignity and freedom of expression as well.'" *Frank v. Maryland,* 359 U.S. at 376 (Douglas, J., dissenting).

In the dissenters' view the detached magistrate was clearly crucial to preserving individual liberty.

In 1967, this Court overruled *Frank* and reaffirmed a warrant requirement in *Camara v. Municipal Court,* 387 U.S. 523 (1967), and *See v. City of Seattle,* 387 U.S. 541 (1967). *Camara* involved an area safety inspection. During an inspection of an apartment

house the city inspector demanded to view the ground floor in belief that the area was being used as a residence contrary to the building's occupancy permit. The inspector's demand was denied. After two more refusals, the tenant was arrested.

In overruling *Frank,* this Court held that the Fourth Amendment's purpose is to safeguard individual privacy against arbitrary invasions by government officials. These decisions clearly require that except in cases of emergency or consent a warrant must be obtained. This Court proclaimed:

> "The basic purpose of this Amendment, as recognized in countless decisions of this Court, is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials. The Fourth Amendment thus gives concrete expression to a right of the people which 'is basic to a free society.'" *Camara,* 387 U.S. at 528.

This prohibition against unreasonable searches and seizures has been consistently followed and exceptions allowed only in carefully defined cases. The *Frank* rationale that municipal fire, health, and housing inspections touch at most upon the "periphery" of the important interests protected by the Fourth Amendment was specifically rejected in *Camara*:

> "But we cannot agree that the Fourth Amendment interests at stake in these inspection cases are merely 'peripheral.' It is surely anomalous to say that the individual and his private property are fully protected by the Fourth Amendment only when the individual is suspected of criminal behavior." *Camara,* 387 U.S. at 530 (footnote omitted).

In language clearly applicable to the case at hand, this Court rejected the government's attempts to discount the warrant procedure:

> "We simply cannot say that the protections provided by the warrant procedure are not needed in this context; broad statutory safeguards are no substitute for *individualized* review, particularly when those safeguards may only be invoked at the risk of a criminal penalty." *Id.* at 533 (emphasis added).

Finally, this Court rejected the exact arguments of expediency which are once again being asserted by the government:

> "[I]t is vigorously argued that the health and *safety of entire urban populations* is dependent upon enforcement of minimum fire, housing, and sanitation standards . . . . But we think this argument misses the mark. The question is not . . . whether these inspections may be made, but whether they may be made without a warrant." *Id.* at 533 (emphasis added).

The warrant requirement could be relaxed only if the burden of obtaining a warrant is likely to frustrate the governmental purpose behind the search. In *Camara,* as in this case, the warrant requirement as a practical matter was found to have slight impact upon municipal health and safety. No emergency ex-

isted in *Camara* and no reason existed for the government's refusal to get a warrant.

The rationale in *Camara* clearly applied to business premises. In *See,* this Court held:

> "We therefore conclude that administrative entry, without consent, upon the portions of commercial premises which are not open to the public may only be compelled through prosecution or physical force within the framework of a warrant procedure." *See,* 387 U.S. at 545 (footnote omitted).

Barlow's business premises are clearly protected by the Fourth Amendment. *Go-Bart Importing Co. v. United States,* 282 U.S. 344 (1931); *Silverthorne Lumber Co. v. United States,* 251 U.S. 385 (1920); *G.M. Leasing Corp. v. United States,* ___ U.S. ___, 45 U.S.L.W. 4098 (January 12, 1977).

Broad, random searches, such as those conducted by OSHA, of American business premises are precisely the type of abuse this Court sought to void in *Camara* and *See.* The government's attempt in this case to create a "safety" exception to the Fourth Amendment is not based upon any historical or constitutional evidence and for these reasons should be rejected.

Searches of business premises have been allowed only in extraordinary cases involving inherently dangerous and historically federally licensed businesses. *Colonnade Catering Corp. v. United States,* 397 U.S. 72 (1970). OSHA has attempted to stretch this narrow exception to cover "any factory, plant, establishment, construction site, or other area, work-

place or environment where work is performed."[1] In a classic circular argument, OSHA contends that the limited exceptions of *Colonnade* and *United States v. Biswell,* 406 U.S. 311 (1972). which allow inspection of pervasively regulated industries, should apply to all of American industry since OSHA is attempting to pervasively regulate American industry! (Brief at 43-44.)

If this were to apply to the entire gamut of American business, the Fourth Amendment would be drastically weakened. In *G.M. Leasing Corp.* this Court held unconstitutional a search by the Internal Revenue Service agents of a private home and office. As in this case, the government asserted that a broad exception to the Fourth Amendment existed which allowed warrantless intrusions into privacy in order to enforce the tax laws.

In rejecting this argument this Court held the government to a heavy burden:

> "We do not find in the cited materials anything approaching the clear evidence that would be required to create so great an exception to the Fourth Amendment's protections against warrantless intrusions into privacy." *G.M. Leasing Corp.,* 45 U.S.L.W. at 4103.

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[1] 29 U.S.C. § 657(a) (1970). It is difficult to conceive of a more encompassing definition of American industry. The amazing scope of this Act reminds one of the Writs of Assistance which authorized agents of the Crown to enter houses, shops, warehouses, cellars, ships and other structures. "The Rights of the Colonists and a List of Infringements or Violations of Rights, 1772." Schwartz, *The Bill of Rights: A Documentary History* at 205 (1971).

In focusing on the absence of strong statutory authority for searches in exigent circumstances, this Court noted that:

> "The intrusion into petitioner's office is therefore governed by the normal Fourth Amendment rule that 'except in certain carefully defined classes of cases, a search of private property without proper consent is "unreasonable" unless it has been authorized by a valid search warrant.'" *Id.* at 4104.

The government attempts to distinguish *Camara* and *See* by arguing that "a requirement of search warrants for the Secretary's routine general schedule OSHA inspections would provide no meaningful safeguard for an employer's privacy interests." (Brief at 34-35.) Further, the government notes that the scheduling of OSHA inspection is not a matter left to the discretion of the enforcement officer in the field but rather is scheduled by the Secretary's Assistant Regional Directors and Area Directors. (Brief at 37 n.17.)

The government's argument seems to be that unbridled discretion is permissible so long as it occurs at a sufficiently high administrative level. This raises the exact issue resolved by this Court in *G.M. Leasing Corp.* This Court there held:

> "The respondents recognize that one of the Court's critical concerns in *Camara* and *See* was the discretion of the seizing officers. . . . Yet [the statute] clearly gives the Secretary or his delegate discretion as to what property to seize. If more than one location is involved, the Secretary will choose which dwelling will be invaded. If property is to be found both in public places and in private areas, the Secretary may choose which to seize. This hardly can be called a restraint on discretion." 45 U.S.L.W. at 4104.

One of the lessons learned from recent history is that federal administrative and investigative agencies have the potential to be used for purposes of harassment, political or otherwise. No great imagination is required to envision a partisan administration using the inconveniences attending "discretionary" OSHA inspections to punish its enemies. This very real danger requires the interposition of a detached magistrate in order to determine whether probable cause for inspection exists.

II

THE RATIONALES OF OSHA FOR A "WORK SAFETY" EXCEPTION TO THE FOURTH AMENDMENT ARE FACTUALLY AND LEGALLY INACCURATE

The government in its brief has attempted to reverse the burden of proof and turn the Fourth Amendment against the very people it was intended to serve. The government states: "Here, there is no significant privacy interest at stake that calls for the *imposition* of the warrant requirement." (Brief at 13 (emphasis added).) Two assertions serve as underpinning for the government's rejection of the Fourth Amendment. Both of these assertions are untrue.

A. Unannounced Warrantless Searches Are Not Necessary to the Effective Implementation of OSHA

While the government repeatedly asserts "that unannounced inspections are essential to the enforceability of the statute" (Brief at 16), this assertion is unsupported. In reality, the overwhelming weight of evidence indicates that warrantless searches are unnecessary to achieve a safe workplace.[2]

Additionally, OSHA admits that warrantless unannounced searches are not crucial to the implementation of the Act:

> ". . . OSHA prefers to achieve voluntary compliance through its training, education and information programs. The programs are based on an enlightened relationship existing between OSHA and the vast majority of the business community. In other words, I am assuming that most employers will comply with OSHA's standards if they know what they need to do and are convinced that a safe and healthful workplace pays."[3]

Reliance on voluntary compliance is one of the many alternative forms of government safety and health programs available. Another method of achieving a

[2] "A major reason for the long-range decreases in fatality, injury, and severity rates relates to the changing mix of industries comprising the United States economy. Moreover, automation has reduced accidents and the severity of accidents within heavy industry. Bolle, Mary Jane, "Benefits and Costs of the Occupational Safety and Health Act: A Review of the Available Evidence," *Congressional Research Service* 13 (Jan. 28, 1977).

[3] Smith, Robert Stewart, "The Occupational Safety and Health Act," *American Enterprise Institute* 64 (January 1976), quoting a memorandum of John H. Stender, Assistant Secretary of Labor for OSHA to James L. Blum, dated October 31, 1973.

safer workplace is through informational programs. Government research on safety hazards and the distribution of warnings can effectively reduce hazards especially if this form of safety is accompanied with financial penalties which are another alternative method of injury reduction. These penalties could be built into a workman's compensation system or into an injury "tax" system.[4]

The important factor here is that a myriad of alternate approaches to a safe workplace exist, the vast majority of which are within the constitutional framework of the United States. These constitutional approaches have resulted in a forty-year trend of decreasing work accidents.[5] OSHA's unconstitutional efforts have had little or no effect in accelerating this trend.

B. It Is Misleading to Allege that Violations Can Be Easily Concealed

The government's brief raises the spectre of hidden violations capable of discovery only by unannounced OSHA inspections. The employer's fear of unan-

[4] *Supra*, note 3 at 73. The use of economic incentives as a possible solution to the OSHA dilemma (and parenthetically the Fourth Amendment problems) has been suggested by the Director of the Office of Management and Budget, the Chairman of the Council of Economic Advisors, and a Domestic Affairs Aid to the President. The memorandum states in part:

> "Among other issues serious consideration should be given to totally eliminating most safety regulations and replacing them with some form of economic incentives." *Occupational Safety and Health Reporter*, "Current Report," July 1977, at 236.

[5] *National Safety Council*, "Accident Facts," 23 (1976). This publication graphically illustrates this historic decline in accidents.

nounced inspections will keep the workplace safe. The government even asserts that an employer "often can easily conceal hazardous working conditions." (Brief at 12.)

Beyond these vague references, however, there is little or no substance to OSHA's assertions. The number of willful violations discovered overall by OSHA is miniscule when compared with the total number of violations.[6]

The remedial nature of OSHA is well established.[7] Surprise, deceit, and generalized fear are elements of punitive enforcement programs and as such cannot justify warrantless searches under a remedial statute. Yet the government argues for the broadest of all tools to enforce this remedial legislation—a tool historically associated with repression. The public interest has always been hostile to unconstrained "dragnet" type searches. This Court observed in *Camara:*

> "For example, in a criminal investigation, the police may undertake to recover specific stolen or contraband goods. But that public interest would hardly justify a sweeping search of an entire city conducted in the hope that these goods might be found. Consequently, a search for these goods, even with a warrant, is 'reasonable' only when there is 'probable cause' to believe that they will be uncovered in a particular dwelling." *Camara,* 387 U.S. at 535.

[6]The number of willful *and* repeat violations amounted to only 1,003 out of a total of 139,714 violations for the period of October 1976 to June 1977. Willful violations are, of course, an even smaller part of this total. Of the willful violations, not all are "hidden" violations. OSHA apparently keeps no statistics on "hidden" violations and none are cited in its brief. (*See,* OSHA Compliance Activity Report for July 30, 1977.)

[7]*Anning-Johnson Company v. United States O.S. & H.R. Com'n,* 516 F.2d 1081, 1088 (7th Cir. 1975).

Since OSHA inspections are entirely random and without cause, they fall into the proscribed category of general searches.

C. Probable Cause Searches Would Provide Greater Protection for Workers Than Would Random Inspections

The government lays great stress on the inconvenience of obtaining a warrant before attempting an inspection. In its Brief at 40, appellant notes that the Act covers nearly 65 million workers in approximately five million workplaces and the Secretary is currently conducting 80,000 inspections yearly with 1,300 inspectors.

If the Secretary is inspecting only 80,000 of the five million workplaces, this means that he can inspect annually only 1.6 percent of all workplaces. Such an extremely low rate of inspection demands some basis for selection in order to maximize the effectiveness of the inspection. To expend this severely limited capacity on random shots in the dark is the height of administrative incompetence. The purpose of the Act, to protect the American worker, would be far better served by requiring a probable cause triggering mechanism for such inspections. Such a device has in fact been established in the very section of the Act which creates the inspection power. When any employees or represen-

tatives of employees believe that a safety or health violation exists, they may notify the Secretary. The Secretary must then evaluate such notification to determine whether there are reasonable grounds to believe that such a danger exists. If the Secretary finds such grounds, he must make a special inspection. If not, he must notify the employees in writing. 29 U.S.C. § 657(f)(1).

Shifting the thrust of OSHA inspections to this type of probable cause evaluation would no doubt upgrade the effectiveness of the inspections. Although the government makes the undocumented statement that its data shows that random general schedule inspections result in a higher percentage of discovered violations than those triggered by complaints or fatality reports (Brief at 36 n.15), such quantification is meaningless. We are not given a readout of the relationship of truly dangerous violations as opposed to the nit-picking variety for which OSHA has become notorious. Mere logic, however, would indicate that it is more important to find a smaller number of major hazards, than to find an infinite number of wholly technical violations.

Although *amicus* is somewhat nonplussed by the "cops and robbers" mentality evidenced by OSHA in its brief, a requirement of probable cause for inspection would in no way diminish either the treasured element of surprise nor the motivation of employers to maintain a safe workplace. Obtaining a warrant would not require advance notice to employers. And the employers' safety orientation would

be increased by the knowledge that rather than running a 1.6 percent chance of a random inspection, substantial hazards brought to OSHA's attention by employee complaints would trigger an immediate inspection.

A probable cause requirement, then, would in no way diminish the effectiveness of OSHA but rather would immediately upgrade the quality of inspections and allow a greater number of inspections of truly hazardous workplaces.

III

ADMINISTRATIVE SEARCHES IF LEFT FREE OF CONSTITUTIONAL RESTRICTIONS WILL SWALLOW THE FOURTH AMENDMENT

Whether a warrant should be required before an administrative search may take place without consent is increasingly important in our society. Federal inspectors are competing with state and local inspectors, criminal investigators, tax inspectors, safety inspectors, health inspectors, and a myriad of environmental inspectors on all levels of government.[8] There is no end in sight.

In each case the privacy of one's life is diluted. In this case the government has suggested that there

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[8]Administrative searches are discussed in: Rothstein and Rothstein, "Administrative Searches and Seizures: What Happened to Camara and See?", 50 Wash. L. Rev. 341 (1975); Comment, "The Validity of Warrantless Searches Under the Occupational Safety and Health Act of 1970," 44 Cinn. L. Rev. 105 (1975); T. Cooper, "Administrative Inspections and the Fourth Amendment," 12 Washburn L.J. 203 (1973).

are no "legitimate privacy expectations" and that there is "no Fourth Amendment standing."[9] These are frightening propositions which run counter to law and history.

The "right of privacy" is "one of the unique values of our civilization" *(McDonald v. United States,* 335 U.S. 451, 453 (1948)), and protection against governmental intrusions into the home and workplace is "the very essence of constitutional liberty and security." *Boyd v. United States,* 116 U.S. 616, 630 (1886).

The OSHA statute in issue here has no safeguards against abuse. No judicial officer is interposed between the searching officer and the individual. The statute is broad in its sweep; OSHA inspectors seek to search all business premises without probable cause. The massive sweep of OSHA must be considered as a broad challenge to the second clause of the Fourth Amendment.

For this Court to sanction this major step beyond *Camara* and *See* would "reduce the protection of the householder 'against unreasonable searches' to the vanishing point." *Ohio v. Price,* 364 U.S. 263, 269 (1960).

Every drawer, cabinet, room, refrigerator, chair, and cranny in the workplace is subject to inspection. The Fourth Amendment provides a zone of privacy against government; the warrant clause provides a buffer between the individual and government:

[9]Jurisdictional Statement of Government at 14-15 and n.17.

> "[P]rotection, in other words, of the dignity and integrity of the individual—has become increasingly important as modern society has developed. All the forces of a technological age—industrialization, urbanization, and organization—operate to narrow the area of privacy and facilitate intrusions into it. In modern terms, the capacity to maintain and support this enclave of private life marks the difference between a democratic and a totalitarian society."[10]

The strict requirements of a warrant must apply across the full gambit of federal intrusion. The history of the Fourth Amendment requires a broad construction with strict adherence to the necessity of obtaining a warrant prior to any search. This requirement of a warrant is based upon the value attached to the neutral and detached magistrate and the existence of reasonable grounds for a search. *Johnson v. United States,* 333 U.S. 10 (1948). Exceptions to this construction must be narrowly drawn. Here a broad exception will swallow the Fourth Amendment protections as to the entire business sector. No historical or factual justification exists for this precedent.

[10]Emerson, "Nine Justices in Search of a Doctrine," 64 Mich. L. Rev. 219, 229 (1965).

CONCLUSION

For the reasons stated above, the decision of the three-judge court should be affirmed.

Respectfully submitted,

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